EMPLOYMENT TRIBUNALS

Claimant: **Mr L Rees**

Respondent: **Cardiff Council**

Heard at: **Cardiff** **On: 1 – 3 July 2024**

Before: **Employment Judge C Sharp (sitting alone)**

Representation:
Claimant: In person
Respondent: Mr C Howells (Counsel)

JUDGMENT having been sent to the parties on 8 July 2024 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. The Claimant brought an unfair dismissal claim, having been dismissed following a period of absence from work due to ill-health. The Tribunal was provided with a hearing bundle of 393 pages, given additional disclosure during the hearing arising from questions put by the Claimant when cross-examining the Respondent's witnesses, and heard orally from Lauren Bodman, Waste Education and Enforcement Manager; Lucy Payne, the dismissal officer; Matthew Wakelam, the appeal officer; and the Claimant. References to pages in the hearing bundle are in square brackets.

Law

2. The ability to claim unfair dismissal is under s94 Employment Rights Act 1996 and amplified by s98:

*"**94 The right***

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do …

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality …

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case. …"

3. For a capability dismissal, the key test is set out by Lord Denning MR in **Taylor v Alidair Ltd** [1978] IRLR 82, [1978] ICR 445**:**

"Whenever a man is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable and incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."

4. The **Alidair** test is three-fold:

(a) Does the employer honestly believe that the employee is incapable of doing the job; and

(b) Are the grounds for that belief reasonable?

(c) Are they based on a reasonable investigation?

5. In cases of ill-health capability, in **East Lindsey District Council v Daubney** [1977] ICR 566 the Employment Appeal Tribunal ("EAT") stressed the importance of consultation and discovering the true medical position. It was said by Phillips J that:

> *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employers' medical advisers, will cause them to change their opinion. There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."*

6. The EAT in **DB Schenker Rail (UK) Ltd v Doolan** EATS 0053/09 emphasised that, while **Daubney** requires an employer to establish the *"true medical position"* before deciding to dismiss, this should not be read as requiring a higher standard of enquiry than required for a misconduct dismissal; the investigation must be reasonable in all the circumstances. In **Spencer v Paragon Wallpapers Ltd** [1977] ICR 30, tribunals were reminded that every case depends on its own circumstances.

7. All of this confirms that the tribunal must look at the matter from the perspective of the Respondent and assess whether it has acted reasonably and within the range of reasonable responses. This includes consideration as to whether, in all the circumstances, the Respondent should have been expected to wait any longer, and if so, how much longer. Relevant circumstances include the nature of the illness, the likely length of the continuing absence, and the need of the employer to have done the work which the employee was engaged to do (**S v Dundee City Council** 2014 IRLR 131).

Findings and conclusions

Background

8. The claimant's employment with the respondent started on 6 June 1999. He was employed as a waste education and enforcement officer by the time of the events in question before the Tribunal. On 5 June 2023, the Claimant started sick leave, from which he never returned. [180] sets out the initial contact between the parties which is not challenged. The Claimant told his manager that he was absent from work due to "*stress and anxiety at work due to the proposed restructure".* Shortly before the Claimant went on sick leave, his team had been informed that there was a proposed restructuring likely to be undertaken, but that no jobs would be lost. This was confirmed by the slides sent to the Claimant about the proposal on 7 August 2023 while he was off sick so he could be involved in the consultation. It appears from the slides that more permanent posts were to be created, as opposed to job losses. There is no dispute that the restructuring has yet to take place (industrial action affected the progression of the plans).

9. The Claimant submitted a sick note (statement of fitness for work) on 12 June 2023 [181] which said that he would be off sick with work-related stress and physical symptoms related to stress for another three weeks. The GP notes [358] confirm this. This is the only sick note that references any physical symptoms.

10. On 19 June 2023, the Claimant had his first contact meeting under the attendance and well-being policy with Craig Owen, a manager. The notes were available to the Tribunal, together with the stress risk assessment that was carried out [182 and 188]. There is no dispute by the Claimant that these documents are accurate, though he says that the long conversation he had with Mr Owen about itching in an intimate area were not set out in detail as it was "*taboo*". The Claimant now says that while he suffered from stress, the physical symptom that was the barrier to his attendance at work was the itching, which was so severe it caused him to bleed. The notes record that the Claimant was sick due to work-related stress, principally caused by the restructuring proposal and the attitude of the operations managers towards him. Physical symptoms were mentioned, but not itching. It is clear from reading the notes that the reason why the Claimant was absent from work was stress and I make this finding. The notes were accepted as accurate and were contemporaneous.

11. On 29 June 2023, a further sicknote was issued [191] which said that the Claimant would be absent from work for another month due to stress at work. There is no mention of any physical symptoms. I note that there is never any mention of physical symptoms from this point onwards in the sick notes. The GP notes [158] shows that the Claimant on this date told the doctor that he was concerned the Respondent was trying not to pay him redundancy pay. I place weight on this because the GP is required to put accurate information in their

medical notes and it is a contemporaneous note. This comment is unexplained as the restructure did not involve the loss of posts. The itching was mentioned but also a cyst. The focus of the consultation though was stress.

12. On 18 July 2023, the Respondent made an occupational health referral [192]. A further sicknote was issued on 26 July 2023 [196], saying that the Claimant would be off for another month due to stress at work. Again, there was no mention of any physical symptoms. The GP notes [158] show that the Claimant did not complain to his GP about any itch. The itch is not raised again with his GP until 24 August 2023.

Contact notes

13. The second contact meeting took place on 1 August 2023 between the Claimant, Lauren Bodman, and HR [197]. This is an appropriate moment to talk about the contact notes because all of the notes about the meetings between Ms Bodman and HR with the Claimant are disputed by the parties. Having considered all of the evidence, I prefer the Respondent's account and place reliance on the contact notes as an accurate contemporaneous record of what was said in those meetings. This is because in my judgment the Claimant has been evasive and cannot be relied upon about this point. The Claimant gave the impression to the tribunal, particularly in his questioning of Mrs Payne and Mr Wakelam that he had never seen these notes and they had been withheld. He made an allegation to Ms Bodman, suggesting that she had falsified the notes, an extremely serious allegation to make that normally requires some evidence behind it. There was none.

14. However, HR had been present at the meetings and so would have been well placed to challenge if documents had been falsified or inaccurate. More importantly, the Respondent produced additional evidence that showed that was due to the new protocol under COVID, the contact note of the actual meeting that had just taken place were attached to the invitation for the next meeting. This was because if people were not physically in the same place, it was difficult for a signature to be placed upon the notes. The meetings with Ms Bodman were on Teams. Ms Bodman's evidence was that in addition the notes were read out at the end of the meeting and accepted by the Claimant which, given that they were handwritten and of a contemporaneous nature, is plausible.

15. What was not plausible was the Claimant saying that despite receiving the emails, though he initially resisted accepting that the email was the letter to which he referred in his evidence, he did not notice that there were attachments as he been focusing on the invitation. The Claimant claimed that he had not opened the attachments and was effectively IT illiterate as he was only able to use IT on his phone. I do not accept this evidence. The Claimant talked about having to deal with his doctor online, therefore he was able to use his phone for the purposes of accessing digital information; it is unclear why the Claimant an

intelligent man with considerable experience would be so focused on the invitation to the next contact meeting to talk about his health that he completely missed the attachments to invitation emails. The Claimant never addressed why he was asserting the contact notes had never been sent to him when they had, choosing to ask why he had not been asked to put a digital signature on them, and moving his position at Tribunal from an assertion that they had been withheld from him. The Claimant did not directly answer questions put to him by Mr Howells under cross-examination, despite reminders that this was required.

16. The Claimant before the dismissal meeting was sent a copy of all the documents, including the contact notes. The Claimant said that he did not open the pack, so had not reviewed them. The Claimant was given a hard copy of the same documents at the meeting and was asked if he had enough opportunity to familiarise himself with them; the Claimant said that he just wanted to get on the hearing and did not consider the documents to be important; this is not credible when his job was at risk. The Claimant was given an opportunity to ask for more time; he did not take the opportunity. Again, I find that this is not credible.

17. The Claimant was represented by a union representative; the Claimant's answer was that his representative was poor and so any alleged defects were not noticed by him. The contact notes were read out at the dismissal meeting as shown by the minutes and accepted by the Claimant; the Claimant said he felt that he could not challenge them, despite feeling able to challenge everything else. The Claimant went to appeal and again there was no challenge made to the accuracy of the notes; the Claimant blamed this on his mental health, saying he was not in a position to do so. This rather undermined his argument was that he fit for work - if he was not fit enough to challenge the accuracy of the notes, he was not fit enough for work. I do not find the Claimant's evidence regarding the contact notes credible. In his dealings with the Respondent and at the hearings, the Claimant was more than happy to challenge matters, and indeed accepted that meetings with the Respondent got heated as a result. It is not credible that these notes were inaccurate and the Claimant said nothing. It is credible that the Claimant simply choose not to read them, if it was not for the fact that they were then read out at the dismissal meeting and he still did not challenge them. I therefore will rely on the contact notes as accurate contemporaneous record of what happened in those meetings.

18. The contact notes as a whole show a consistent theme that the Claimant was stressed, and said nothing about the itch. It is clear that it is the restructuring that was the cause of the majority of the stress and the Claimant said he would not return to work until it was complete. The impression given is that the Claimant was seeking redundancy when he said in the contact meetings that he was not going to attend an interview as part of the restructuring process, he was not going to cooperate and did not respond to the consultation about the restructuring. This conclusion is further supported by the references to wanting

redundancy to the GP, the comment in his witness statement about his ability to live off redundancy payments and his pension, and the contents of the document at page 252 where the GP says that by 24 August 2023, the Claimant had effectively decided he was not going to return to work.

19. The notes also show that the Claimant remained very angry with the Respondent about perceived historic injustices at its hands and the fact that he blamed it for matters that were outside its control, such as the breakdown of his family relationships. They also confirm that the Claimant was told, as he accepted at every meeting, that his job was at risk. I do not accept the Claimant's evidence that he did not understand what that phrase meant. Again, I make the point, the Claimant is an intelligent man with considerable experience both in this workplace and outside who gained many skills that would be useful in the workplace; it is simply not credible than a man in his mid-50s was unaware of what "*your employment is at risk*" means; it means he might lose his job.

20. Finally, the contact notes do also show that the Respondent did offer counselling and kept asking if there was anything they could do to get the Claimant back into the workplace. The Claimant's answer repeatedly was no and that there had been no improvement. This then led to a reference to occupational health [236] dated 14 August 2023. This report was by Dr Ahmed, and the Claimant consistently referred to how helpful he had found this doctor and that he agreed with the contents of his report.

Occupational health

21. The occupational health report in passing referred to the itch but also refers to the Claimant having treatment for this; it was not the focus of the report or perceived as a barrier to his return. I place a great deal of weight on this report as it is a contemporaneous medical report by a qualified medical practitioner who had met the Claimant, and who specialises in occupational health. The focus of this report was that the Claimant was suffering stress and that he was not fit for work. From this report, the Respondent knew that there was an itch, but it was being treated (and the Claimant accepts he never told occupational health that the treatment was allegedly ineffective).

22. The Respondent also knew from Dr Ahmed's report that the Claimant would benefit from treatment for stress and the resolution of the work issues. It is very common for occupational health to make the point that until the underlying work issue that triggered the stress is resolved, nothing further can be done. Both the Claimant and the Respondent had already identified what the work issues were; it was principally the restructuring proposal and secondarily the operation managers. The contact notes show that the restructure was discussed every time, and the Claimant said he was not going to return until it was completed. The Respondent also knew from Occupational Health and the Claimant that no reasonable adjustments were possible and there was no idea when he would

be fit to return to work.

The position after Dr Ahmed's report

23. After the occupational health report, the Claimant persisted in saying there had been no change to his health and the Respondent could not help with his return. There is a further sick note [245] of 24 August 2023 issued, stating that he would be sick for another two months. At a further contact meeting on 5 October 2023, it is accepted by both parties there was a heated discussion between the Claimant and Ms Bodman [253] where the Claimant said he was entitled to be off sick for up to 6 to 12 months and Ms Bodman explained that was not the case.

24. The final sicknote was issued on 25 October 2023 [266]; it said the Claimant was going to be sick for a further two months, taking him up to late December 2023 At the tribunal hearing, the Claimant was unable to answer why, if the barrier to work as he asserted at Tribunal was purely the itch, the GP thought he would require another two months off work. The GP said the reason was stress, which is accepted by the tribunal.

25. The medical records provided [358] show a more complex picture of what was happening at the time he was off sick. They show that on 24 August 2023 the Claimant visited his GP again and mentioned that he had an itch, but nothing was prescribed until October 2023. The Claimant's evidence initially was that the medication was not steroid creams, but notes show that the initial cream prescribed was Eurax, which contains an element of a steroid (hydrocortisone). There were difficulties in obtaining this cream and with the intervention of a pharmacist by 18 October 2023, the notes how that the Claimant was placed on hydrocortisone which is a steroid cream. There is nothing in the medical records that says the Claimant returned to the GP or needed any further medical assistance other than a repeat prescription. The Claimant ultimately said that the cream resolved the itch almost by magic; while I do not have detailed medical evidence before me on this topic, I was prepared to take notice of the fact that steroid creams can have such a dramatic effect.

26. However, I do not accept that the evidence shows that the Claimant suffered from an itch that was so bad that it was the reason why he was unable to go to work; it is only mentioned a couple of times to the GP who did not prescribe any cream until October 2023; it was mentioned to Dr Ahmed in August 2023 but was not described as a significant issue; it was never mentioned to the Respondent at the contact meetings certainly from 1 August 2023 onwards and was not described as a barrier; the sick notes never mentioned the itch, and there was only one reference to anything physical in the sick notes (the first one). It is inconceivable that if the Claimant had been suffering from an itch in an intimate area which caused pain and bleeding, he would have allowed that situation to continue for months without receiving any proper effective treatment from the GP or telling Dr Ahmed or the Respondent. The Claimant's evidence

was that he had used creams bought over the counter, which I find to be plausible but also an indication that the itch was not so serious it was preventing the Claimant from working. I find as a fact that the Claimant was off work due to stress and the itch was not the reason, or part of the reason, why he was off work.

27. The Respondent at the time of dismissal did not have sight of the GP notes at [358], and therefore could not be aware of the contents. However, it did receive the sick notes, attended the contact meetings with the Claimant and had a copy of those contact notes, and considered the occupational health report of Dr Ahmed. It was reasonable in my view for the Respondent to conclude at the time of dismissal that there was no barrier to work caused by the itch or to have been unaware until the dismissal meeting that the Claimant had changed his position from saying that he was off work due to stress and his mental health to asserting at the dismissal meeting that the issue was the itch.

Dismissal

28. Returning to the timeline of events, by 31 October 2023 the Respondent could see no improvement. The Claimant again told Ms Bodman at the contact meeting on that date that there was no change in his health. While the Claimant did not seek redeployment and said his position had not changed, Ms Bodman thought about redeployment and sought advice from occupational health on this topic. The advice of Dr Olaylinka [271] was that this was not possible as the reason why the Claimant said he was off with stress was due to work issues, not medical ones. In other words, until the restructure was completed (and it remained on pause due to the ongoing industrial action), the Claimant on his own account could not return to work.

29. The Claimant complains that this advice was inappropriate and should not be given by the doctor without him being examined or consulted. I disagree. The advice was based on the report and examination by Dr Ahmed, the Claimant said that there had been no change and the Respondent had sought professional advice from a registered medical professional. It is for that professional to decide if he needed to see the Claimant. The advice is also entirely consistent with the occupational health report produced by Dr Ahmed, the GP fit notes and the Claimant's own account; until the work issues that the Claimant says was preventing him from returning were resolved, it was not a medical matter. I considered whether the Claimant should have been given the actual email from Dr Olaylinka but considered as that the gist he was given was accurate, it was not unfair to fail to forward the actual email. I also did not consider that any further occupational health report would have been of assistance at this time. The Claimant said that there was no change and the primary reason that he was stressed (the restructure) was unresolved.

30. The Respondent proceeded to stage 3 and to consider whether or not the Claimant should be dismissed for incapacity. The Claimant was given

appropriate notice of this step. At this point, the Claimant chased the NHS and obtained a telephone appointment to talk about needs and options for his mental health issues on 19 November 2023 [281]. I considered carefully whether it was fair to proceed with the dismissal meeting as the Respondent knew that this appointment was only going to take place five days later. I concluded that as this appointment was an initial chat, months had passed and the Claimant was still saying he was not fit for work, it was fair. The Claimant did not complain that he had suffered any distress or disadvantage by being given the opportunity to put this point directly to the chair at the dismissal meeting (which he did). Mrs Payne was able to consider whether it was reasonable to dismiss when the next appointment was five days away at the dismissal meeting.

31. The dismissal meeting took place on 14 November 2023 [287 onwards]. This was the first time that the Respondent was told by the Claimant that the barrier to returning to work was the itch. As explained above, the evidence showed that the Claimant never said this before to the Respondent and the evidence does not support a conclusion that the itch was a barrier. The barrier was stress caused by the workplace issues. The Claimant was dismissed as Mrs Payne on behalf of the Respondent concluded that there was no likelihood of resolving the work issues given that the restructuring had still yet to take place, and it had no idea as a result when the Claimant would be fit for work.

32. I consider that at the time of dismissal the Respondent acted fairly. It had followed a fair process, including everything required under the ACAS Code of Practice and its own process, and there was nothing unfair that happened within the process. The Claimant complained that Ms Bodman the presenting officer sat next to Mrs Payne, the chair of the meeting, before he entered the room; I considered there was nothing in this and it was not raised at the hearing itself as a concern by either the Claimant or his union representative. Indeed, it was hardly surprising that Ms Bodman did not walk in and out with the Claimant when previous meetings with him had been heated. The Claimant was unable to point to any evidence of Ms Bodman staying at the deliberation stage and the minutes before me showed that Mrs Payne made her decision in the company of HR.

33. The Tribunal finds that Mrs Payne at the time of dismissal had a genuine belief that the Claimant was incapable of performing his duties and that she had formed this belief on reasonable grounds following a reasonable investigation. The Claimant was unable to return to work and could give no indication when he could to do. There was nothing further to be obtained in circumstances where persistently the Claimant and his GP were saying that he was unfit for work and that there was nothing that could be done to assist him with getting back to work. Occupational Health had been consulted more than once and agreed that until the work-related issues were resolved, there was no prospect of the Claimant being fit to return. A mere discussion about mental health options that might have been available to the Claimant which Mrs Payne knew was due to

take place on 19 November 2023 was reasonably viewed as unlikely to result in the Claimant's prompt attendance at work, particularly when there was a history of him having significant issues in the workplace which he remained very angry about and the restructuring being ongoing with no completion date.

34. Given the additional costs at a time when councils are financially desperate for cash (the Respondent addressed this in witness evidence), and the fact that the Claimant was repeatedly saying he would not return to work until the restructuring was complete, I found that it was not reasonable to expect the Respondent to wait any longer for his return. There was no indication when the Claimant would be fit to return. I found that dismissal was within the range of reasonable responses. If I am incorrect in finding that the Respondent was reasonable in refusing to wait any longer and should have waited until the telephone appointment had taken place, that failing was rectified by the appeal which took place after the telephone appointment on 19 November 2023.

Appeal

35. I turned my attention next to the appeal against dismissal, which was heard on 4 December 2023 [minutes at 318 onwards]. The appeal raised more questions than the initial dismissal decision. The first new piece of information available to the parties was the outcome of the telephone appointment the Claimant had with primary care mental health services on 19 November 2023. There is no official record of the outcome but the Claimant says, and I am willing to accept his evidence in this regard, that the service did not consider him as requiring any assistance from it. There was no treatment plan. This suggested that the nature of the Claimant's mental health issues were not ones that could be addressed by the available medical services provided by that primary care team. It is not clear whether this was because the Claimant had improved, though no fit notes saying so were provided, whether the Claimant having been dismissed effectively resolved his work-related issues and therefore no longer suffered stress, or whether his case was simply not severe enough to justify support from the primary care mental health service. What the appeal officer, Mr Wakelam, did know by the time of the appeal meeting was that there was no further mental health treatment available for the Claimant.

36. The Claimant asserted that Mr Wakelam was biased against him; I noted that the Claimant's union representative prior to the appeal hearing asked unsuccessfully for a different appeal officer [312]. This was because Mr Wakelam had an involvement in a previous disciplinary against the Claimant and later dealt with his grievances and requests to work overtime. Within that request, there was nothing substantial or substantive that reasonably justified a change of appeal officer – there are no details and no explanation why Mr Wakelam would be biased against the Claimant. Simply not agreeing with somebody about a grievance or overtime does not mean they are unable to deal with an appeal on an unrelated matter. The Claimant did not raise the issue at the appeal hearing or in any depth in these proceedings. I did not consider

the appointment of Mr Wakelam as appeal officer to be unfair.

37. I was more concerned about the GP's letter [314] dated 1 December 2023. It is an unusual letter. The GP says that they have seen the Claimant twice in the last week and that the Claimant says he is feeling well and the Claimant says that he is well enough to return to work. There is no medical opinion from the doctor in this letter; he simply sets out what the Claimant has told him. Further, this letter does not deal with the statement of fitness to work certificate [266] issued by the same GP practice which told the Respondent that the Claimant was unfit for work due to stress until late December 2023. The GP did not either revoke it or issue an updated statement that the Claimant was now fit. This is not explained, but the evidence available to the Respondent at the appeal was that the fit note said the Claimant was unfit, but the Claimant had told his GP otherwise.

38. There is a dispute between the Claimant and Mr Wakelam about whether Mr Wakelam was given this letter and a copy of the GP notes [358] and allowed to read them properly. The Claimant could not explain why the documents were not provided in advance as set out by the process and when he was represented by the union. The Claimant's evidence that he placed the pack on Mr Wakelam's desk. Mr Wakelam says that he was shown documents but did not think he had been given them. Mr Wakelam was asked why he did not take the documents and take a break to read them in detail; his evidence was that he did not as matters had become heated. The minutes [320] show that the Claimant supplied the medical notes but is silent about the GP letter. Mr Wakelam accepted at the tribunal hearing that he had seen pages 314 (the letter) and 358 (GP notes) during the appeal hearing.

39. I concluded that Mr Wakelam had not read these documents in depth but had read them; while demeanour is rarely a strong basis on which to make findings, his behaviour and expression when giving evidence in these proceedings were of a man who had "sort of" seen the documents, but was not 100% familiar with what they exactly said. Unusually though, I do not consider this to be unfair in circumstances where the minutes show that the Claimant told Mr Wakelam what the documents said. Mr Wakelam also accepted that he was not a medical expert and therefore was limited to what he was being told. I would make the observation that an appeal manager would be wise to take a break and read all documents in case the account given orally of their contents is not accurate, but the evidence shows that at the time of the appeal decision, Mr Wakelam was aware a GP had seen the Claimant, that the Claimant was now saying the itch was under control and there was no more treatment to come, but there was no medical evidence supporting what the Claimant was saying. The most recent statement of fitness to work was not revoked, the restructuring was yet to complete, and the Respondent had reasonably concluded that the Claimant had not been consistent in his account about his medical issues (see below)

40. Should there have been a further reference to occupational health at the appeal

stage? As Mr Wakelam explained he could have taken this step but in his view the work issues were still unresolved. The restructuring had not taken place. The response of Occupational Health was likely to be that it could not confidently advise about the Claimant's ability to work in future until these workplace matters were resolved; I accept this because that is what happened last time Occupational Health was consulted.

41. The Claimant undermined his position at the appeal hearing by claiming that he did not suffer from stress at work, but then spent part of the appeal hearing saying that he would not be able to return to work and detailing his grievances against the Respondent. Critically, there was no medical evidence supporting a finding the Claimant was fit for work; the GP had not officially changed their opinion; Occupational Health said that the workplace issues needed to be resolved to enable the Claimant to return and Mr Wakelam knew that the workplace issues were not resolved and were not likely to be resolved by a particular date because the restructuring was still ongoing. While the Claimant was saying at the appeal hearing that he was fit, the work issues were unresolved, and he remained unable to focus on the future without persistently dwelling on his grievances about the Respondent. The Claimant also undermined his position by changing what he said had been the barrier to return to the itch when the evidence before Mr Wakelam was that this was not a significant issue (including the medical evidence from the GP shown to Mr Wakelam). It is clear that Mr Wakelam was sceptical about what the Claimant was telling him and, in my judgment, there were reasonable grounds that scepticism.

42. Objectively, while it is not for me to substitute my view for that of the Respondent, I concluded that the evidence at the Tribunal hearing supported a conclusion that the Claimant wanted redundancy from a very early stage when the restructuring proposal was announced. It was supported by what the Claimant was saying to the Respondent in the contact meetings, what he was saying to his GP and what he said in his witness statement. The evidence shows that the itch was not the reason the Claimant was unable to work; the medical evidence was that it was stress due to work-related issues and the restructuring was the primary barrier. The Claimant had been found by the Respondent to be untruthful in claiming at the dismissal stage that the only barrier to work was the itch and it reasonably concluded that matters were much more deep-rooted– the Respondent was not confident that the Claimant could either return to work immediately or indeed at any point in the future, given the restructuring and his evident anger with his employer. I find that Mr Wakelam reasonably concluded that the root causes of the Claimant's absence had not been resolved and his attendance at work remained uncertain for the foreseeable future. The Claimant's evasiveness (which was echoed at the Tribunal hearing), including changing the reasons why he was unable to work when he thought it would suit him, reasonably would cause any appeal officer to be concerned, and Mr Wakelam was reasonably sceptical about the Claimant's likelihood of returning to work and carrying out his duties within a

reasonable timeframe. I find that the dismissal was substantively and procedurally fair.

43. If I am incorrect and the Claimant was unfairly dismissed, I consider it more likely than not that the relationship would have broken down and the Claimant would have been unable to work given the continuing restructure and his desire to be made redundant. In any event, he had not appropriately mitigated his loss. The evidence before me is that the Claimant applied for 3 jobs in 7 ½ months and there is no evidence at all that he made any application in respect of HGV driving work, something to which he is qualified.

Employment Judge C Sharp
Dated: 25 July 2024

REASONS SENT TO THE PARTIES ON 29 July 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche